STATE OF MICHIGAN

COURT OF APPEALS

DAVID D. PETERS, Plaintiff-Appellant,	UNPUBLISHED May 10, 2011
v	No. 300691 Wayne Circuit Court Family Division
ANA PEDRESCHI, Defendant-Appellee.	LC No. 09-114864-DM

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Plaintiff David Peters appeals as of right the trial court's order denying his motion to modify the provisions of the parties' judgment of divorce concerning parenting time and for an order concerning the day care of the parties' minor child. This case arose from defendant Ana Pedreschi's decision to enroll the child in a new day care center without consulting Peters. We vacate the trial court's order and remand for further proceedings.

I. FACTS

Peters and Pedreschi were divorced in June 2010. They have one minor child. The judgment of divorce grants the parties joint legal and joint physical custody of the child. The judgment also grants Peters parenting time every other weekend, one Wednesday overnight during the week that he does not exercise parenting time during the weekend, and for three non-consecutive weeks during the summer.

Peters has lived in Livonia, Michigan, since 1999. Peters is a financial advisor who determines his own work schedule; he has an office where he conducts scheduled appointments, but otherwise works from home. From about May 2008 until July 2010, Victoria Medina cared for the child while the parties were at work. Medina does not run an institutional day care; rather, she cares for a few friends' children. The home where Medina runs her day care is less than seven miles from Peters' home. According to Peters, during the time that Medina was the child's day care provider, Peters would frequently pick the child up from Medina's care and spend time with her. According to Peters, the parties always had some kind of agreement about who was picking the child up.

Pedreschi works in Troy. Before the divorce, she lived in Livonia. At some point, presumably after the parties separated, she moved to Northville. In approximately the first week of July 2010, Pedreschi moved to a house that she had purchased in Rochester Hills. Also around this time, without consulting Peters, she enrolled the child in Giggle Gang Daycare and Preschool in Troy. Giggle Gang is eight miles from Pedreschi's new home in Rochester Hills. According to Pedreschi, Giggle Gang is approximately 26 miles and 39 minutes from Peters' house one way and 30 miles and 35 minutes the other way. However, according to Peters, it takes about an hour each way and it can take longer if traffic is slowed by accidents or construction.

In late July 2010, Peters filed a motion to modify the divorce judgment to allow him equal parenting time and to restore the previous day care situation. After an evidentiary hearing, the trial court denied the motion. The trial court ruled that the change to the new day care center did not modify an established custodial environment. More specifically, the trial court's ruling concerning established custodial relationship was as follows:

> The court believes that this change, although I'm getting it retrospectively, is not a modification of the established custodial environment, for the same reasons as [*Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010)]. In fact, the court finds as a matter of fact that there is no change effectively of parenting time at all. I have heard no testimony that indicates that [the child's] time with her parents, particularly even [Peters] would be significantly effected [sic] at all. And that makes the decision fairly easy.

Therefore, the trial court continued, Pedreschi had the burden of proving by a preponderance of the evidence that "the change" is in the child's best interests. The trial court noted that Pedreschi's move was already complete: "the bell can't be unwound [sic] at this point." But it found that the child "is in a daycare facility is superb . . . . Highly educational. [The child] seems to be thriving there, and the court so finds."

The trial court then turned to the best interest factors set forth in MCL 722.23 and determined that most of the factors were either not relevant or did not favor either party. Concerning MCL 722.23(d)—"[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"—the trial court found:

> There was a move, it was done, and I think there is—the court is going to resolve that factor by saying this. There appears to be nothing but benefit to [the child] from this. The environment is close, or she is not missing parenting time with her father.

On MCL 722.23(j)—"[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents"—the trial court said that "[s]ome work can be done on this issue" and recommended that the parties mediate future disputes. It did not make any finding concerning which party, if either, this factor favored.

After its review of the best interest factors, instead of specifically finding that the change was in the child's best interests, the trial court emphasized that it considered itself bound by *Pierron v Pierron*:[1]

> [T]his is not a factually driven case. I am not finding that one parent acted improperly and one parent acted properly. My decision is made solely, emphasizing that, on the dictates of [*Pierron*]. I feel bound by it. Its ruling fits this case appropriately. And every judge has to be bound by the law. *Pierron* is the governing law in this case. And as long as that's the case this ruling has to be made consistent with that. The parties aren't able to work it out, otherwise, respectfully, this motion is denied.

Peters now appeals.

II. REVIEW OF THE TRIAL COURT'S JUDGMENT

A. STANDARD OF REVIEW

Peters argues that the trial court erred in concluding that it was bound by *Pierron* to a particular result instead of making a determination on the basis of all of the relevant factors. This Court should affirm "all orders and judgments of the circuit court . . . unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue."[2] "Under this standard, [this Court] should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction."[3]

B. LEGAL STANDARDS

In *Pierron*, the Michigan Supreme Court explained the relevant legal framework for resolving a custody dispute like the one in this case. The Child Custody Act provides that when parents share joint legal custody "the parents shall share decision-making authority as to the important decisions affecting the welfare of the child."[4] "However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child."[5] Accordingly, "the court must first consider whether the proposed change would modify the established custodial environment."[6] "The established custodial environment is the environment in which 'over an appreciable time

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[1] *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010).

[2] MCL 722.28.

[3] *Pierron*, 486 Mich at 85 (citations and quotation marks omitted).

[4] MCL 722.26a(7)(b).

[5] *Pierron*, 486 Mich at 85.

[6] *Id.*

the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.'"[7] The Court went on to explain:

> While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified. If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed. [8]

The Court added that the trial court "may not change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."[9]

In applying these principles, the Court in *Pierron* considered whether the change of school proposed by the defendant-mother, to one 60 miles from the children's present school, would modify the established custodial environment.[10] After an evidentiary hearing, the trial court ruled that the change would modify the established custodial environment, which was with both parents, because the plaintiff-father's parenting time would be adversely affected by the 60-mile distance between the new school and his home.[11] It also concluded that the defendant had not established, by clear and convincing evidence that the change was in the children's best interests.[12] This Court held that the trial court erred in concluding that the established custodial environment would be modified, vacated the trial court's order, and remanded for a "best interests" analysis under the preponderance of the evidence standard.[13] The Michigan Supreme Court affirmed this Court, holding:

> Although the testimony here established that [the] plaintiff is conscientiously involved with his children's education, there is no reason to believe from either the testimony or the trial court's findings of fact that the change of schools will significantly modify the established custodial environment the children share with [the] plaintiff. A review of the record indicates that the children visit [the] plaintiff's home approximately three weekends out of every four, from Saturday afternoon until Sunday evening. Before the instant action was filed with the trial court, the children did not visit overnight on weeknights

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[7] *Id.* at 85-86, quoting MCL 722.27(1)(c).

[8] *Id.* at 86.

[9] *Id.* (citations and quotation marks omitted); see MCL 722.27(1)(c).

[10] *Pierron*, 486 Mich at 84.

[11] *Id.*

[12] *Id*.

[13] *Id*. at 84-85.

during the school year. The record also indicates that [the] plaintiff occasionally picks the children up from tutoring and takes them out to dinner during the week. And, one week out of every seven, [the] plaintiff takes the children out to lunch.

Given this record, [the] plaintiff's weekend parenting time will be unaffected. With regard to weekdays, [the] plaintiff is involved with the children during the daytime for only one week out of every seven because this is all that his work schedule allows. Although the 60-mile distance is acknowledgedly [sic] more inconvenient for [the] plaintiff, it is not so far that [the] plaintiff cannot continue his occasional midweek activities with his children and his involvement in their education. Moreover, the record reflects that the children spend the vast majority of their time in the established custodial environment of their mother, the defendant.[14]

The Supreme Court also held that, if a proposed change would not modify a child's established custodial environment, the trial court must determine whether each best interest factor applies, but if a factor does not apply, it need not address it further.[15] The Court emphasized that it was not holding that a change of school will never modify an established custodial environment.[16] It remanded to the trial court for an assessment of the best interest factors under the preponderance of the evidence standard.[17]

C. APPLYING THE LEGAL STANDARDS

1. OVERVIEW

We vacate the trial court's order because the trial court committed at least three legal errors on major issues. First, the trial court erred by failing to make adequate findings concerning the existence of an established custodial environment. Second, the trial court erred in concluding that it was bound by *Pierron*. And, third, the trial court erred in denying Peters' motion without addressing his request to modify parenting time.

2. EXISTENCE OF AN ESTABLISHED CUSTODIAL ENVIRONMENT

The trial court erred by failing to make adequate findings concerning the existence of an established custodial environment. "When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment."[18] "The custodial environment of a child is established if

[14] *Id.* at 87-89.

[15] *Id.* at 93.

[16] *Id*. at 93 n 6.

[17] *Id*. at 93-94.

[18] *Id.* at 85.

over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."[19]

In this case, the trial court found that the change in day care centers would not modify the established custodial environment, but it failed to make any findings concerning the characteristics of that established custodial environment. It did not specify whether the established custodial environment it found existed with Pedreschi, Peters, or both, or what parenting time arrangements and residence or residences it included. This analysis should have included findings concerning the amount of time actually spent with each parent, including the parenting time Peters exercised on weekdays and weeknights. The parenting time Peters exercised outside of his scheduled parenting time under the terms of the divorce judgment is also relevant to the established custodial environment determination.[20]

The trial court's failure to make such findings is particularly troubling in light of the recentness of the parties' divorce and Pedreschi's move to Rochester Hills. The parties were divorced in June 2010, and the provisions of the judgment of divorce became effective on that date. Pedreschi apparently moved to Rochester Hills in early July 2010, and enrolled the child at Giggle Gang in early- to mid-July 2010. Moreover, Peters exercised one of his three non-consecutive summer weeks of parenting time the week of July 4, 2010, during which the child attended horse camp.

Under the circumstances, we decline Peters' invitation to make a de novo determination that an established custodial environment existed with both parents. Although we may make a de novo determination whether an established custodial environment exists if the record contains sufficient information,[21] we decline to do so in this case. It is not a foregone conclusion, based on the record before us, that an established custodial environment existed at all. It is not clear, for example, how long Pedreschi lived in Northville after the parties separated, whether the parenting-time situation changed after the entry of the judgment of divorce, and, if so, whether the few weeks between the entry of the judgment and Pedreschi's move to Rochester Hills, which included an atypical week of horse camp, amounts to "appreciable time" sufficient to establish a custodial environment.[22]

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[19] MCL 722.27(1)(c).

[20] See *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) ("A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order."); *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995) ("In determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed.").

[21] See *In re AP*, 283 Mich App 574, 604; 770 NW2d 403 (2009).

[22] MCL 722.27(1)(c).

Assuming an established custodial environment did exist, the parties disagree about its nature. Pedreschi asserts that it is clear from the testimony at the evidentiary hearing that the established custodial environment is with her alone. Peters disagrees. Indeed, there was conflicting testimony concerning the frequency of Peters' actual parenting time. Peters testified that, when Pedreschi lived in Northville, Peters "frequently" picked the child up from day care, even if it was not his scheduled day, and spent time with her. The child's paternal grandmother confirmed that, after the divorce, but while Medina still cared for the child, Peters exercised more parenting time than every other weekend and every other Wednesday. Medina also testified that, since June 2010, Peters frequently picked the child up in the evening or during the day, at 2:00 p.m. or 3:00 p.m. Pedreschi, however, denied that Peters had exercised this additional or unscheduled parenting time after the divorce.

Moreover, we are unable to review with the appropriate level of deference the trial court's determination that the change to Giggle Gang did not modify the established custodial environment without the benefit of knowing with whom the trial court found that established custodial environment to exist. Finally, even if we were to make a de novo determination concerning the child's established custodial environment, for the reasons explained, we would nonetheless be compelled to vacate the trial court's order and remand for further proceedings to remedy the trial court's additional legal errors.

3. TRIAL COURT'S IMPROPER RELIANCE ON *PIERRON*

The trial court erred in concluding that it was bound by *Pierron* to a particular result and, as an apparent consequence, in failing to meaningfully consider all of the factors relevant to its determination. The *Pierron* Court emphasized that it was not holding that a proposed change of school would never modify an established custodial environment; it simply held that, "*under the specific facts of this case*," such a modification would not follow from the proposed change.[23] Moreover, *Pierron* only held that the trial court's finding concerning modification of the established custodial environment was against the great weight of the evidence. The Court remanded for the trial court to assess the children's best interests under the appropriate standard. In so doing, it instructed that:

> [E]ven by a 'preponderance of the evidence' standard, this case presents a very close question with regard to whether attending Howell Schools is in the best interests of the children. It is clear that [the] plaintiff is concerned about his children, is involved in their education, and provides guidance, structure, and discipline even when the children are not in his care. While the change of schools would not modify the established custodial environment, we recognize that the change of schools may, in fact, impair [the] plaintiff's ability to be readily accessible to provide guidance and structure. These facts, of course, are relevant to assessing where the interests of these children lie, and, on remand, we

[23] *Pierron*, 286 Mich at 93 n 6 (emphasis added).

> encourage the trial court to carefully consider all relevant factors when making this assessment.[24]

The trial court's apparent belief that *Pierron* dictated that its best interests analysis result in a particular outcome was clearly erroneous. And, apparently as a result of that mistaken legal conclusion, the trial court failed to adequately assess the child's best interests. As we noted previously, the trial court only made findings on two of the best interest factors. On MCL 722.23(j)—"[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents"—the trial court merely observed that the parties had some work to do. It did not make any finding concerning which, if either, party the factor favored. If anything, this factor would appear to favor Peters, given Pedreschi's decision to change day care centers without consulting Peters.

The trial court also purported to address MCL 722.23(d)—"[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity"—acknowledging its relevance, but then only stating that "[t]here appears to be nothing but benefit to [the child] from this" and "[the child] is not missing parenting time with her father." With its cursory treatment, the trial court failed to actually address the language of factor (d). It did not make any findings concerning the length of time the child had lived in any particular environment, either with Pedreschi or Peters, or in a particular day care setting. Nor did it address the relative benefits of continuing day care with Medina and the change to care at Giggle Gang. Although *Pierron* specifically permits a trial court to find on the record that a factor does not apply and not address that factor further, where a proposed change will not modify an established custodial environment, nothing in *Pierron* sanctions the trial court's perfunctory treatment of this highly *relevant* factor. The remedy for a trial court's failure to make "reviewable findings of fact" is a remand for a new custody hearing.[25]

4. PARENTING TIME

The trial court erred in denying Peters' motion without addressing his request to modify the parenting time provisions of the judgment of divorce to grant him additional parenting time. To the extent this issue unpreserved, we "may overlook preservation requirements when the failure to consider an issue would result in manifest injustice," or where "consideration is necessary for a proper determination of the case."[26]

By the end of the evidentiary hearing, it appears that Peters was willing to accept Pedreschi's continued use of Giggle Gang for the child's day care, *if* Peters was permitted the additional parenting time he had requested and was permitted to use Medina for the child's day

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[24] *Id.* at 93-94.

[25] *In re AP*, 382 Mich App at 605.

[26] *General Motors Corp v Dep't of Treasury*, ___ Mich App ____; ___ NW2d ___, (Docket No. 291947, issued October 28, 2010), slip op at 16.

care during his parenting time. Peters' counsel stated that she did not expect the trial court to order Pedreschi to sell her house and move back to Northville, so "[w]e're asking that [Peters] have more time to accommodate this, and that the transportation be shared." During his testimony, Peters acknowledged that it was beneficial for the child not to have to drive far on the days Pedreschi takes the child to day care, and defense counsel did not oppose Peters taking the child to Medina during his parenting time.

Nonetheless, the trial court considered only whether the change to the new day care modified the established custodial environment and whether Pedreschi had met her burden of establishing that that change was in the child's best interest. It failed to consider Peters' request to modify the parenting time provisions of the judgment of divorce to grant him additional parenting time. This should have been an entirely separate analysis, conducted under MCL 722.27(1)(c), which governs modification of previous judgments or orders, and the parenting time factors in MCL 722.27a.[27] This error alone is grounds for vacating the trial court's order and remanding this matter for proper consideration.

5. DAY CARE DECISION

Additionally, Peters takes issue with the unilateral nature of Pedreschi's decision to enroll the child in a new day care facility and with the trial court's emphasis on the fact that Pedreschi's move and change of day care centers were complete and could not easily be undone. While Peters' frustration is understandable, the trial court's task in determining this custody and parenting time matter was, and will be again on remand, to consider the child's custodial environment, regardless of how that environment came to pass,[28] and the best interests of the child. We note, however, that the trial court may find Pedreschi in contempt if she fails to include Peters in important future decisions concerning the child's welfare as required by the divorce judgment.[29]

III. CONCLUSION

We vacate and remand for further proceedings. On remand, the trial court shall determine, using current information, whether an established custodial environment exists, and, if so, with which parent. It shall determine, under the appropriate standard, and after a thorough

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[27] See *Shade v Wright*, ___ Mich App ____ ; ___ NW2d ____ (Docket No. 296318, issued December 2, 2010), slip op at 6 (considering the standards governing a request to modify parenting time; holding that "a more expansive definition of proper cause or change of circumstances [than the one set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), governing a change of *custody*] is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment.").

[28] See *Berger*, 277 Mich App at 707; *Hayes*, 209 Mich App at 388.

[29] *Mann v Mann*, 190 Mich App 526, 534; 476 NW2d 439 (1991) (providing that a party may be held in contempt for violating a custody order).

assessment of the relevant factors, whether Pedreschi has satisfied her burden of proving that the change in day care providers is in the child's best interests. It shall also address Peters' request to modify the parenting time provisions of the judgment of divorce. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood